

***United States Court of Appeals
for the Second Circuit***



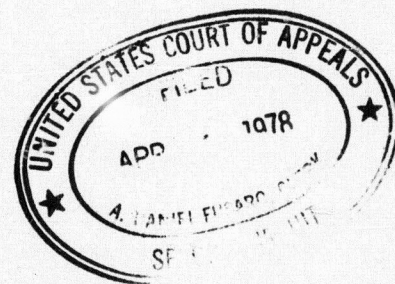
AMICUS BRIEF

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77-6215

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6215



PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff-Appellee,

v.

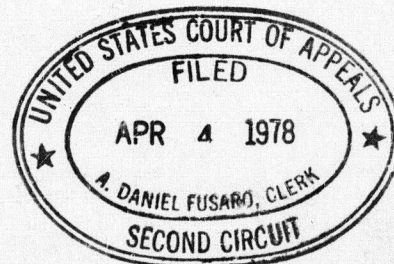
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF OF AMICUS CURIAE
CONSUMER FEDERATION OF AMERICA



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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	i
I. SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT DOES NOT ESTABLISH PARTICULAR CRITERIA FOR WITHHOLDING WITHIN THE MEAN- ING OF EXEMPTION THREE OF THE FREEDOM OF INFORMATION ACT	2
CONCLUSION	4

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Administrator, FAA v. Robertson, 422 U.S.</u> 255 (1975)	3
<u>STATUTES:</u>	
<u>Freedom of Information Act</u>	
5 U.S.C. 552(b)	1
5 U.S.C. 552(b)(3)	2, 3
Pub. L. No. 94-409, 90 Stat. 1241 (1976) (Government in the Sunshine Act)	2
<u>Consumer Product Safety Act</u>	
Section 6(b)(1), 15 U.S.C. 2055(b)(1)	1, 2, 3
<u>OTHER STATUTES:</u>	
49 U.S.C. 1421	3
<u>CONGRESSIONAL REPORTS:</u>	
H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976)	3

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Amicus Consumer Federation of America submits this brief in response to the brief filed in this case by plaintiff-appellee Pierce & Stevens Chemical Corp ("P & S"). In our main brief, we focused solely on the principal legal question posed in this case, i.e., whether as a matter of law the district court's interpretation of § 6(b)(1) of the Consumer Product Safety Act ("CPSA" or the "Act")^{*/} and the Freedom of Information Act ("FOIA")^{**/} was

^{*/} 15 U.S.C. § 2055(b)(1).
^{**/} 5 U.S.C. § 552(b).

erroneous. In this reply brief we will address only one issue raised by P & S with respect to this central legal question. Specifically, we will respond to P & S's argument that § 6(b)(1) is a substantive withholding statute under exemption three of the FOIA, 5 U.S.C. § 552(b)(3).

I. SECTION 6(b)(1) DOES NOT ESTABLISH PARTICULAR CRITERIA FOR WITHHOLDING WITHIN THE MEANING OF EXEMPTION THREE OF THE FOIA.

In our main brief, we noted that § 6(b)(1) "merely establishes procedures to be followed when material is to be disclosed." (Amicus at 19) (emphasis in original, footnote omitted). In contrast, P & S has argued that § 6(b)(1) "articulates substantial criteria for withholding," thereby constituting a substantive withholding statute which satisfies the requirements of exemption three. (P & S at 17). We did not anticipate the breadth of P & S's claim with respect to § 6(b)(1)'s status under the FOIA; ^{*/} but in any event P & S has misunderstood the reach of the FOIA's exemption three. We respectfully submit that § 6(b)(1) is not an exemption three statute because it fails to establish the particular criteria for withholding that Congress explicitly required in the 1976 amendment to the FOIA. ^{**/}

Illustrative of the "criteria" upon which P & S relies is § 6(b)(1)'s reference to disclosure "fair in the circumstances and reasonably related to effectuating the purposes of this Act." But application of this vague terminology would be contrary to

^{*/} See Amicus n. ^{*/} at 20.

^{**/} Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241 (1976).

the FOIA's present (b)(3) exemption, in addition to representing a wholesale repeal of the FOIA as it applies to the Commission. (Amicus n. */ at 20).^{*/} In enacting the 1976 amendment to subsection (b)(3), and thus overruling Administrator, FAA v. Robertson,^{**/} Congress specifically rejected similar vague and open-ended authority to withhold material requested under the FOIA. H. R. Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976).^{***/}

Robertson involved the authority of the FAA to withhold where disclosure "is not required in the interest of the public."^{****/} We submit that § 6(b)(1)'s reference to disclosure "fair in the circumstances and reasonably related to effectuating the purposes of this Act" is indistinguishable. Each vests the agency with virtually unreviewable discretion to bar disclosure. Such a result is inconsistent with the remedial purposes of the FOIA and its emphasis on disclosure,^{*****/} as reaffirmed by the narrowed exemption three adopted by the 1976 amendment.

Therefore, § 6(b)(1), even when viewed as a substantive statute, fails to provide the particular criteria required in order to qualify as an exemption three statute under the FOIA.

*/ See also Amicus n. */ at 12 and n. */ at 17.

**/ 422 U.S. 255 (1975).

***/ By narrowing exemption three in overruling Robertson, Congress withdrew "withholding" status from all previously enacted statutes that fail to satisfy the requirements of the 1976 amendment.

****/ 49 U.S.C. § 1421.

*****/ See discussion, Amicus at 8.

CONCLUSION

For the foregoing reasons and for those reasons expressed in its original brief, Consumer Federation of America respectfully urges this Court to reverse the district court's order in this case preliminarily enjoining the release of the three records requested under the FOIA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File a Reply Brief and Reply Brief of Amicus Curiae Consumer Federation of America has been served by mail, first-class and postage prepaid, on counsel for defendant-appellant Consumer Product Safety Commission, Mark Mutterperl, Esq., Civil Division, Appellate Section, Department of Justice, Washington, D.C. 20530; and counsel for plaintiff-appellee Pierce & Stevens Chemical Corp., William L. Rieth, Esq., Phillips, Lytle, Hitchcock, Blaine and Huber, 3400 One Marine Midland Center, Buffalo, New York 14203, this 31st day of March, 1978.

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